United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2667

United States Court of Appeals

FOR THE SECOND CIRCUIT

PASQUALE A. NATARELLI a/k/a PAT NATARELLI,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE

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TABLE OF CASES.

Issue Presented.

In the opinion of appellee, the following issue is presented:

I. Whether the correction of an improper sentence requires the vacating of the sentence on each count, along with a remand to the District Court for resentencing on only one count of the indictment.

United States Court of Appeals

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PASQUALE A. NATARELLI,
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v.

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No. 74-2667.

BRIEF FOR APPELLEE

Counterstatement of the Case

The Government is in substantial agreement with the petitioner-appellant's Preliminary Statement and Statement of Facts.

ARGUMENT

I. The correction of an improper sentence on a two count indictment requires only the vacating of the sentence on one count, leaving intact that sentence which is justified and consistent with the obvious intent of the District Judge.

The Government concedes the authority of *Braverman v. United States*, 317 U.S. 49 (1942), is controlling of the facts of this appeal.

The Government concedes that a petition pursuant to Title 28 U.S.C. § 2255 is a proper method of raising the issue presented in this appeal. This concession is based upon the authority of *Gorman v. United States,* 456 F. 2d 1258 (2d Cir. 1972).

The only issue remaining in this appeal is whether the correction of an improper sentence requires the vacating of the sentence on each count, together with a remand to the District Court that the defendant be resentenced on only one count of the indictment. It is submitted that the proper administration of justice requires only that one sentence be vacated, with that sentence remaining which is justified and consistent with the intent of the District Court Judge at the time of the original sentence.

The Government urges that this Court's decisions in *Gorman v. United States, supra,* and *United States v. Pravato,* 505 F.2d 703 (2d Cir. 1974), are controlling on the issue in this case. Neither case is meaningfully distinguishable from the case at bar, and both offer a completely reasonable solution to the dilemma raised by this appeal.

The reasoning of the Second Circuit in *Gorman v. United States, supra,* is especially pertinent to the resolution of this appeal. In *Gorman,* this Court made this specific finding that where the intentions of the sentencing Judge were clear, to remand the case for resentencing would be needlessly time consuming and a meaningless act. In this case, the intentions of the District Court Judge are equally clear and were in no way "tainted" or influenced by the presence of the second count of the indictment. In this regard, there is no evidence to the contrary that Judge Henderson was aware that a sentencing on each count would be violative of *Prince v. United States,* 352 U.S. 322 (1957). Faced with the same dilemma as that of the District Court Judge in *Gorman v. United States,*

supra, Judge Henderson chose to provide that the sentences run concurrently. Since this sentencing took place in 1967, he did not have the benefit of the procedure outlined in *United States v. Corson,* 449 F.2d 544 (3d Cir. 1971), as approved by this Court in *Gorman v. United States, supra.* Nonetheless, his solution was equally reasonable.

The defendant argues that despite the fact that he was sentenced to concurrent terms, the matter nonetheless is a justiciable controversy. In supporting this theory, the defendant attempts to distinguish the Second Circuit decisions in *United States v. Berlin* and *United States v. Marino* and relies specifically on *United States v. Mori.* It is submitted that the defendant has wrongfully distinguished the Second Circuit cases, and that his reliance on *United States v. Mori* is misplaced.

The Second Circuit in *United States v. Berlin,* 372 F.2d 1002 (2nd Cir. 1973), after reversing one of two counts, refused to remand to the District Court for resentencing. In that case, the District Court, sentenced the defendant to concurrent one-year sentences and a non-cumulative fine of $2,500.00. The Circuit Court reasoned that since the sentence imposed was within the maximum provided for a one-count conviction and there was no evidence that the District Court's sentence was in any way influenced by the conviction on the reversed count, there was no need to remand it for resentencing.

In *United States v. Marino,* 421 F.2d 640 (2nd Cir. 1970) the Court reversed convictions on two counts of the nine counts upon which the defendants were convicted. The Second Circuit refused to remand this case for resentencing. While acknowledging that there is no jurisdictional bar to the consideration of challenges to multiple convictions, even though there is concurrent sentences (Citing *Benton v. Maryland,* 395 U.S. 384 (1969)); the Court was convinced that the removal of

the convictions on those two counts would have no effect on the sentences received by the appellants. In addition, the Court pointed out that they did not see any "taint" carried over to the other counts from the District Court's failure to dismiss the reversed counts prior to the time the case was sent to the jury. It based this opinion on the fact that all counts refer to the same scheme to defraud, and all evidence presented on each count was relevant to the overall crimes charged.

It is submitted that the Second Circuit's reasoning in each of these cases is very pertinent to the case in question.

There is no question that the evidence presented on each of the two counts charged against Mr. Nattarelli would be equally admissible if the defendant were charged with a single count of conspiracy. As such, the defendant could hardly take the position that the Judge was "tainted" by any evidence not properly admitted before the Court.

Moreover, the sentence that was imposed by Judge Henderson on Count I of the indictment was within the limits prescribed for that count. The sentence with regard to Count II of the indictment is within the limits prescribed for a violation of that statute. The fact that these sentences were made to run concurrently is pertinent, and there is no indication that Judge Henderson was in any way influenced by the fact that there were two counts.

Furthermore, there is no indication or basis to suspect that had this matter been brought up before Judge Henderson prior to his death, that he would have any basis for changing his mind with regard to the sentence. This is so even if Judge Henderson agreed with the defendant's motion.

The defendant has principally relied on the case of the *United States v. Mori,* 444 F.2d 240 (5th Cir. 1971). In that case, the Fifth Circuit reversed the conviction on the basis

that the elements of proof necessary to sustain a conviction for each of the conspiracy counts were identical.

Pertinent to this discussion is the fact that the Fifth Circuit rejected the Government's position that the defendant was not prejudiced due to concurrent sentences, *only* on the basis that the trial court imposed *cumulative* fines on both counts with the result that the total fine exceeded the maximum possible under either conspiracy statute. In that situation, the Court held that the proper remedy was to vacate the sentences, and remand to the District Court for re-sentencing on one count.

Although the Fifth Circuit in *Mori* points out that the error is not cured by the existence of concurrent sentences; it is pertinent to note that this would be true only where there is some evidence that the sentence was "tainted" by the reversed count, or where the proof involved in the reversed count was different from that which would be permitted on the first count (See, *generally, United States v. Marino,* 421 F.2d 640 (2nd Cir. 1970); *United States v. Berlin,* 472 F.2d 1002 (2nd Cir. 1973)).

Conclusion

WHEREFORE, it is respectfully submitted that the District Court's sentence on Count II of the indictment be vacated, but that sentence with regard to Count I be affirmed.

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AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Pasquale A. Natarelli et al
v
U. S. A.
Docket No. 74-2667

I, Roger J. Grazioplene being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 3 day of March, 19 75 I mailed 2 copies of a printed Brief in the above case, in a sealed, postpaid wrapper, to:

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Buffalo, New York 14202

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

Gerald J. Houlihan, U. S. Attorney

233 U. S. Courthouse, Rochester, New York 14614

Roger J. Grazioplene

Sworn to before me this

3 day of March, 19 75

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 19 75